communication and reduce the time and costs of communicating with and negotiating with a incumbent LEC. Similarly, it will be much more efficient for the incumbent LEC to have a designated small company contact. From the incumbent LECs' perspective, this rule will concentrate small company expertise in designated personnel. For small companies, this rule will decrease search costs and information costs. This reduction in transaction costs will reduce the administrative costs and burdens of interconnection and resale negotiations resulting in much more efficient transactions.

Second, the Commission should require a tightened and more structured dispute resolution timeline for small companies. SCBA advocates the following rules:

- A small cable company should be able to petition for arbitration within 60 days of submitting an interconnection or resale request to the incumbent LEC.
- The incumbent LEC would have 25 days to respond.
- The state commission shall resolve each issue set forth in the petition and the response, if any, and shall conclude the resolution of any unresolved issue within 90 days of the time to respond. The state commission shall impose appropriate conditions as required to implement section 251© and to accommodate the unique circumstances of a small competitive telecommunications provider.

These rules will accelerate the negotiation process and provide small cable companies expedited access to an abbreviated administrative process. These rules will decrease costs, increase procedural certainty and efficiency for small cable, and provide a heightened incentive

for incumbent LECs to promptly negotiate with small companies. These are the substantive results of a good faith standard that will help reduce barriers to entry for small cable.

2. Special standards for small cable in state mediation and arbitration proceedings.

The *Notice* seeks comment on whether the Commission should adopt standards or methods for arbitrating disputes.[19] SCBA advocates adoption of specific arbitration standards for small companies seeking interconnection or resale from an incumbent LEC. As discussed above, the administrative costs and burdens of protracted negotiations and arbitration erect barriers to entry for small cable, both in terms of increased costs and reduced access to capital.

SCBA suggests arbitration standards that align with the good faith rules recommended above. First, each state commission shall designate a small company contact person. Commission rules should require state commissions to designate a small company contact person and publish or provide on request the name, address, phone numbers and times of availability of that person. This named individual shall become familiar with and responsible for small company issues, negotiations and mediations between small companies and incumbent LECs, and arbitration of small company cases. This will facilitate communication and reduce the time and costs of negotiating with and arbitrating against an incumbent LEC. The state commission small company contact person will also gain familiarity with terms that other small companies in that state have obtained from incumbent LECs. By acting a small company information clearinghouse, the small

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[19] *Notice* at ¶ 268.

company contact person will assist small companies and incumbent LECs in minimizing issues in dispute, decreasing the times and costs of negotiation or arbitration, and allowing small companies to reduce the use of outside counsel and consultants. These reductions in transaction costs will help reduce the administrative costs and burdens on small cable and will produce much more efficient transactions.

Designation of a small company contact person at each state commission will also foster more efficient administration at the state level. By concentrating in named individuals responsibility for small company interconnect and resale matters, state commissions will increase expertise in resolving small company issues. Regulators will not have to "reinvent the wheel" for each new small company case.

Second, the Commission should adopt a national standard for the timing of state arbitration for small cable. The abbreviated timelines outline in the previous section will reduce costs and increase certainty for small cable.

3. Small cable companies eligible for special rules.

The Commission should also establish which small cable companies are eligible for the special small cable company provisions. SCBA supports the Commission's use of definition supplied by section 301(c) of the 1996 Act:

> the term 'small cable operator' means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the

United Sates and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $ 250,000,000.[20]

In establishing tnat standard, Congress determined that cable companies meeting these standards required special regulatory treatment. Similarly, in adopting special small cable company rules, the Commission will recognize and accommodate the special barriers to entry faced by small cable. Use of the Section 301(c) standard will also foster administrative efficiency and harmonize Commission rules with the 1996 Act.

IV. THE COMMISSION SHOULD ADOPT NATIONAL STANDARDS TO GOVERN STATE APPLICATION OF THE RURAL TELCO EXEMPTION

The Commission seeks comment on whether it can and should establish some standards for implementing the rural telco exemption of Section 251(f)(1).[21] To SCBA, the answers to these questions are plain: To help remove barriers to entry for small cable, the Commission *must* adopt national standards for application of the exemption.

A. The Commission has ample authority under the 1996 Act to adopt national rule to implement Section 251(f)(1).

The Commission has tentatively concluded that national standards are appropriate for most aspects of interconnection. Section 251(f)(1) is no exception. National standards will provide guidance for state commission, reduce issues for dispute and increase efficiency in determining when the rural telco exemption advances the public interest or unreasonably impedes competition.

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[20]1996 Act Section 301(c)(2).

[21]*Notice* at ¶ 261.

While, the statute delegates first level 251(f)(1) determinations to state commissions, this does not support a conclusion that implementation should be left to state commissions alone. The same rationale that supports national standards for interconnection, resale and arbitration issues supports national standards for the rural telco exemption.

Without national standards, the rural telco exemption can serve as an unreasonable barrier to entry. The Commission has authority under Section 253 to eliminate such barriers. Promulgating national rules on this issue will continue the Commission's proactive approach to implementation. Because small cable and rural telcos compete in many of the same small markets, small cable in particular needs the Commission to adopt national standards in this proceeding.

B. The Commission should adopt national standards to ensure that the exemption does not serve as an unwarranted barrier to entry.

The rural telco exemption has the potential of perpetuating monopoly control over telecommunications services in many markets served by small cable. To assure that monopoly control is maintained only when the public interest requires, the Commission should adopt the following national standards for implementation.

1. The Commission regulations should define "bona fide request".

Under the statute, a small cable company or other entity initiates state review of the exemption with a "bona fide request for interconnection, services, or network elements" submitted

to the state commission.[22] To expedite the administrative process and avoid delay tactics by incumbent LECs[23], the Commission should define "bona fide" as follows:

> In rendering a determination on a request under Section 251(f)(1), the state commission shall presume that any request for interconnection, services or network elements served by a cable operator providing cable service within the rural telephone company's service area is a bona fide request.

The Commission can recognize that small cable operators serving rural areas would not request interconnect unless it were genuinely desired. Small cable should not have to argue this with state commissions.

2. The Commission should define "not unduly economically burdensome."

SCBA understands that Congress intended to provide some protection for rural telcos. This shield should not be used as a sword to attack potential competitors. In nearly all cases, competition will bring some economic burdens to an erstwhile monopoly. The Commission should direct that economic burdens on all parties should be considered. Simple allegations that the incumbent telco's costs may increase should be insufficient to retain an exemption. [24] Similarly, the provision of universal service by a rural telco should not be a factor in retaining an

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[22]1996 Act § 251(f)(1)(A) and (B).

[23]*See, e.g.*, Ameritech letter dated April 25, 1996 to Regina Keeney, Chief Common Carrier Bureau, advocating definitions of "bona fide" that impose barriers sufficiently high to bar small cable from even applying for interconnection. The proposed standard would require disclosure of the proposed uses of each element, advance service purchase commitment, reimbursement of costs and a time period to process the application stretching over half a year.

[24]When customers of an incumbent monopolist are siphoned off, costs per subscriber will increase. This is a natural consequence of competition that should not concern state commissions.

exemption. Nearly all rural telcos will be universal service providers. To this end, the Commission should adopt the following definition:

> In rendering a determination on a request under Section 251(f)(1), the state commission shall consider the economic burdens on all parties involved including the requesting party, the rural telephone company, and consumers in the service area of both. Mere allegations that competition will raise costs and rates will not establish that a request is "unduly economically burdensome."

3. The Commission should define "technically feasible".

Allowing rural telcos to resist competition because it would not be "technologically feasible" threatens to create a disincentive to innovate. Rural customers are equally entitled to advanced telecommunications services. Rural telcos attempting to maintain a monopoly should not be permitted to claim that interconnection, unbundling, etc. is not technically feasible unless it would not genuinely be so under then current industry standards. Consequently, the Commission should adopt the following:

> In rendering a determination on a request under Section 251(f)(1), the state commission shall consider a request as technically feasible unless a party shows that under current industry standards applicable to similarly situated incumbent LECs complying with a request is not technically feasible.

4. The Commission regulation should require rural telcos to have the burden of proof in state proceedings.

The Commission should adopt a national standard that assures that the procompetitive thrust of the 1996 Act permeates state commission proceedings. To this end, the Commission should direct state commissions to allocate the burden of proof in Section 251(f)(1)(B) proceedings to the rural telco. The burden should be upon that incumbent LEC that is *resisting* competition.

The Commission can also recognize that many rural telcos have benefitted for years from low-cost public financing. Commission rules should require the rural telco to show that compliance with a competitor's request would be unduly economically burdensome, technically unfeasible, or inconsistent with Section 254.

5. The Commission should explain the application of "grandfathered" rural telco exception.

Section 251(f)(1)(C) excludes from the rural telco exemption "a request from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming." The subsection then removes this exclusion for "a rural telephone company that is providing video programming as of the date [of the 1996 Act]." This exclusion to the exemption and the limitation on that exclusion raise key definitional issues. The Commissions expertise in regulating the delivery of video programming warrants national standards to guide state commissions.

a. The Commission should broadly define "providing video service."

The Commission should broadly define "providing video service" to include all means of distribution of multi-channel video service including traditional cable, multi-channel multi-point distribution systems, direct broadcast satellite, satellite master antenna television, open video systems, etc. The Commission must also include all affiliates of the telco in this definition as affiliated entities typically provide video due to structural separation requirements. For example, many small telcos currently provide DBS retail services through affiliated entities. Because the

exemption imposes a barrier to entry, the Commission should liberally define the limitation on that exemptions.

b. The Commission should narrowly define the service area applicable to the exception to the limitation.

The limitation to the exemption does not apply to a rural telco that "is providing video services" as of the date of the 1996 Act. The statute does not specify where or to how many subscribers a rural telco must provide video services to benefit from this exception. Without clarification, this provision could cause widespread avoidance of the interconnection requirement, undermining the pro-competitive goals of the 1996 Act.

Example. The situation faced by a small operator of small systems, Friendship Cable, with respect to the rural telephone co-operative in Davie County, North Carolina, provides an excellent example of how the limitation could be abused. During 1995, Yadkin Valley Telephone Membership Corporation ("Yadkin") obtained approval from the Commission to construct and operate a cable television system in one portion of its local service area. It built a competing cable system passing only one hundred homes. Only four of those homes subscribed. Later in 1995, Yadkin submitted another §214 application seeking to expand its cable system to another community. Should Yadkin be exempt from interconnection requirements because it served four customers? No, it should not. Should Yadkin be exempt throughout all of its exchanges? No, it should not.

The Commission should specify that the exclusion to the limitation should apply as follows:

- **More than de minimis service**. The exclusion to the limitation should only apply where the telco provides services to more than a de minimis number of subscribers.
- **Limit to actual service area**. The Commission should clarify that the exclusion to the limitation applies on a franchise by franchise basis, not a company-wide basis. For example, a rural telco providing video service in one town on the date of the Act should not be able to claim the exclusion when it overbuilds a cable operator in another town after the effective date of the 1996 Act. The first sentence of the 47 U.S.C. §251(f)(1)(C) suggests this result.[25]
- **Prohibit exporting exclusions**. An exclusion to the limitation should not apply on a company-wide basis As stated above, it should exist on a franchise by franchise basis. Consequently, even if a rural telco had an exemption in all of its service areas, if the telco merged with another rural provider, the exclusion would not expand to any of the acquiring entity's service areas.

The Commission should clarify these issues for state authorities.

C. The Commission should adopt national standards to regulate the application of the Section 251(f)(2) exception.

The Commission should establish naitonal standards with respect to the broad exemptions rural carriers can seek under Section 251 (f)(2). Although the statute, sets forth three guidelines, the Joint Explanatory Comments reveal that Congress intends the standards to be applied by

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[25]"The exemption...shall not apply...to a request...from a cable operator providing video programming...in the area in which the rural telephone company provides video programming."

regulatory bodies in certain ways. Absent national standards, application of this section will likely result in a patchwork of criteria with the potential of exempting a huge number of telephone companies from interconnection requirements.

Congress made clear that this provision should never be used in an anticipatory manner, only in light of a real threat of actual competition:

> The Senate intends that the Commission or a State shall, consistent with the protection of consumers and allowing for competition, use this authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier.[26]

The Commission should require as a precondition to application under this section: (1) receipt of a bona fide request for interconnection; and (2) the applicant must be a large global or nationwide entity with significant resources. This provision should never apply where the potential competitor is a small cable company.

V. THE COMMISSION MUST ESTABLISH NATIONAL STANDARDS TO PROVIDE ACCESS TO RIGHTS OF WAY.

Pole attachments and access to rights of way are vital to cable. Small cable has encountered substantial difficulty with all types of pole attachment rates terms and conditions over recent years. By making pole attachments difficult and/or expensive, incumbent telcos can raise substantial barriers to entry and limit the ability of cable to offer competitive rates.

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[26]Joint Explanatory Report.

Congress has addressed some of these issues in the 1996 Act. The provisions are meaningless to small cable if their definitions are not clearly established in regulations with national applicability. SCBA strongly urges the Commission to clearly and completely define all access to right-of-way issues

VI. CONCLUSION

Small cable can contribute greatly to bring competition to consumers in parts of the country ignored by larger providers. Small cable, however, has typically faced a web of state regulations and barriers erected by incumbent LECs. The Commission now has the opportunity, and the mandate from Congress, to establish a strong set of national standards that will effectively allow small cable to begin providing competitive services throughout the country. The Commission must establish the national standards and back them up with meaningful and affordable dispute resolution mechanisms.

Respectfully submitted,

By: _____

Eric E. Breisach
Christopher C. Cinnamon
HOWARD & HOWARD
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007
(616) 382-1483

Attorneys for the
Small Cable Business Association